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Te-Moak Tribe of Western Shoshone of Nevada v. United States Department of the Interior

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Te-Moak Tribe of Western Shoshone of Nevada v. United States Department of the Interior,
608 F. 3d 592 (9th Cir. 2010).

Pat Beddow

ABSTRACT

In *Te-Moak Tribe of Western Shoshone of Nevada v. United States Department of the Interior*, the Ninth Circuit Court of Appeals reviewed claims that the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Federal Land Policy and Management Act (FLPMA) when it approved an amended exploration project in northeastern Nevada. The Court defined certain requirements under NEPA, namely the assessment of cumulative impacts. The Court also discussed the scope of the NHPA's requirements to protect only discrete historic locations and the FLPMA's limited application in exploration activities as opposed to mining activities.

I. INTRODUCTION

The Te-Moak Tribe (Tribe) is a federally recognized Indian tribe with ancestral roots in northeastern Nevada in the area which Cortez Gold Mines, Inc. (Cortez) sought to commence mineral exploration.¹ The Tribe challenged the Bureau of Land Management's (BLM) approval of an amendment to an existing exploration project, and cited violations of the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Federal Land Policy and Management Act (FLPMA).²

II. FACTUAL & PROCEDURAL BACKGROUND

¹ *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dept. of Int.*, 608 F.3d 592, 595-596 (9th Cir. 2010).

² *Id.* at 596. The BLM is an agency within the Department of the Interior. Bureau of Land Mgt., About the BLM, http://www.blm.gov/wo/st/en/info/About_BLM.html (last updated Aug. 19, 2010).

The BLM approved Cortez’s original Horse Canyon/Cortez Unified Exploration Project (HC/CUEP) in northeastern Nevada in 2001.³ The HC/CUEP was itself an amendment to the pre-existing Horse Canyon Exploration Project, resulting in a total project area of 30,548 acres.⁴ The original HC/CUEP was a three-phase exploration project, allowing Cortez to disturb only 50 acres within the entire project area.⁵ Phase I called for 150 drill sites, some only 200 feet apart, to determine what minerals were in the area.⁶ Based upon the results of Phase I, Cortez would proceed to Phase II, which would include 125 drill sites with the drill rigs grouped into threes.⁷ Contingent on those findings, Cortez would initiate Phase III with approximately 100 drills located within the footprints of Phase II’s drill sites.⁸

In July 2003, Cortez proposed an amendment to the HC/CUEP (Amended HC/CUEP) that would allow Cortez to disturb up to 250 acres in the project area in aggregate, but not more than 50 acres at any given time.⁹ The exploration phases would remain the same.¹⁰ Cortez estimated that the Amended HC/CUEP would span five years.¹¹ In response to the proposed amendment, the BLM prepared an Environmental Assessment (EA) of the area, pursuant to NEPA, to assess the environmental and cultural resources of the area, as well as the project’s potential impacts on the environment.¹² The BLM “tiered”¹³ the EA to include previous Environmental Impact Statements (EISs), including the EIS for the original HC/CUEP.¹⁴

³ *Te-Moak Tribe of W. Nev.*, 608 F.3d at 596.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 597.

¹³ Tiering refers to the practice of citing matters generally and then incorporating references to narrower analysis’ on the issue from other EISs or EAs. *Id.* at n. 7 (citing 40 C.F.R. § 1508.28 (Westlaw current through Aug. 12, 2010)).

¹⁴ *Id.* The BLM also included an EIS that was prepared for the South Pipeline Project, which assessed other environmental impacts in the area.

Although there was no reservation land in the project area, Native American tribes, including the Te-Moak, claimed that their religions and cultures were engrained in the landscape in and around the HC/CUEPs.¹⁵ Additionally, the project area contained pinyon pine trees, whose pine nuts remain significant in the Tribe’s culture and ceremony.¹⁶ Lastly, the Tribe contended that the HC/CUEP might disturb the remains of their ancestors who may have been buried in the project area.¹⁷

Prior to approving the proposed amendment, the BLM consulted with the Tribe concerning its connection to the land, as required under NEPA and the NHPA.¹⁸ The BLM designated two sites, Horse Canyon and the “White Cliffs”/ top of Mount Tenabo, located within the project area as “Properties of Cultural and Religious Importance” (PCRIs).¹⁹ PCRIs “are eligible for inclusion on the National Register of Historic Places.”²⁰

The BLM sent a letter to the Tribe concerning Cortez’s proposed amendment one year after the proposal was submitted.²¹ In the letter, the BLM asked the Tribe for help identifying any concerns or cultural or spiritual sites in addition to those already identified within the project area.²² The Tribe failed to respond.²³ Approximately one month later, “the BLM submitted a draft EA for public comment,” and sent a copy to the Tribe as well.²⁴ Again, the Tribe did not respond.²⁵ The Western Shoshone Defense Project (WSDP) and the Great Basin Mine Watch (GBMW), however, did respond, later joining as plaintiffs in the case; they requested copies of

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The area around Mount Tenabo has been considered a source of life and creation, and is thus a central religious location for the Western Shoshone. Although impeded by mining activity, the top of Mount Tenabo was often used for prayer and meditation. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 598.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

the BLM's correspondence with the Tribe as well as specific details on the locations of the project.²⁶ The BLM could not provide specific locations to WSDP or GBMW because the locations were not specified in Cortez's plans.²⁷ However, the BLM required Cortez to provide detailed maps of surface disturbance and imposed avoidance measures to protect cultural resources.²⁸ The avoidance measures required Cortez to notify the BLM within 24 hours of discovering cultural resources and to immediately cease activities within 100 meters of the discovery, until it had been examined by the proper authorities and/or a BLM-approved archaeologist.²⁹ Cortez could only resume exploration upon being cleared by an appropriate authority.³⁰ The BLM issued a Decision Record (DR) and Finding of No Significant Impact (FONSI) in late 2004.³¹

The Tribe, GBMW, and WSDP (plaintiffs) petitioned the State Director of the BLM for a review, which was granted.³² The State Director reviewed the DR/FONSI with the plaintiffs and amended it to include an exclusion zone around the PCRIs.³³ The plaintiffs sought judicial review and filed suit in the United States District Court for the District of Nevada against the Department of the Interior, the BLM and several BLM officers under the Administrative Procedures Act.³⁴ Cortez was granted its motion to intervene.³⁵

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (Because the plan was a phased exploration project, all locations were subject to the findings of each phase, and therefore, uncertain prior to actual exploration).

²⁹ *Id.* at 614

³⁰ *Id.*

³¹ *Id.* at 598.

³² *Id.*

³³ *Id.*

³⁴ *Id.* The Administrative Procedure Act is found at 5 U.S.C. § 551 *et seq.* (2006).

³⁵ *Te-Moak Tribe of W. Nev.*, 608 F.3d at 598.

Both parties filed motions for summary judgment as to BLM's compliance with NEPA, NHPA and the FLPMA. The defendant's motion was granted. Plaintiffs appealed.³⁶

III. ANALYSIS

The Ninth Circuit Court of Appeals reviewed the district court's findings to ascertain whether the decision was "founded on a reasoned evaluation of the relevant factors."³⁷ The "arbitrary and capricious" standard required the court to determine whether the agency had taken the requisite "hard look" at the environmental impacts of a proposed course of action and considered the proper relevant factors in reaching its conclusion.³⁸

A. National Environmental Policy Act

NEPA requires federal agencies to collect high quality information on significant environmental impacts when making decisions and to make that information available to the public before any actions are taken.³⁹ NEPA also requires federal agencies to prepare an EA to determine whether the agencies must prepare an EIS or whether the agency may issue a FONSI.⁴⁰

Despite the BLM's preparation of an EA as a basis for issuing the DR/FONSI, which was affirmed by the BLM State Director with more stringent modifications, the plaintiffs argued that (1) the BLM failed to take a "hard look" at the amendment's impacts because all three phases were approved simultaneously; (2) the BLM did not adequately consider alternatives; and (3) the BLM did not sufficiently analyze the cumulative impacts of the amendment.⁴¹

1. Failure to Take a "Hard Look"

³⁶ *Id.*

³⁷ *Id.* at 599.

³⁸ *Id.* (see 5 U.S.C. § 551 (2010); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)).

³⁹ *Id.* (citing *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996); 40 C.F.R. § 1500.1 (Westlaw current through Aug. 12, 2010)).

⁴⁰ *Id.* (citing 40 C.F.R. 1508.9(a)(1) (Westlaw current through Aug. 12, 2010)).

⁴¹ *Id.*

Cortez’s activities could not have been reasonably predicted until exploration had actually commenced because exploration is a necessary requisite to locating minerals.⁴² The court found the BLM was able to assess the potential impacts of all three phases throughout the project area based on the dimensions of drill sites and methods of constructing roadways, with which the BLM had been provided.⁴³ Mitigation measures imposed in the DR/FONSI restricted Cortez from exploring sensitive areas and allowed for exclusion zone expansion if cultural resources were discovered.⁴⁴ Those mitigation measures were adequate compensation for Cortez’s inability to specifically identify the locations of activities within the project area.⁴⁵ The Court concluded that the BLM could approve an exploration project without knowing the exact locations of all drill sites and other activities, as long as they analyzed the impact of the exploration activities in all parts of the project area and implemented avoidance measures to mitigate uncertain impacts.⁴⁶ The court found that the BLM did not violate NEPA’s “hard look” standard because of the nature of the project and the mitigation measures imposed.⁴⁷

2. Failure to Consider Reasonable Alternatives

The plaintiffs argued that the BLM should have considered the alternatives of only approving Phase I, or requiring Cortez to submit its Phase I plans.⁴⁸ Under NEPA, agencies must study and give consideration to all reasonable and viable alternatives with less

⁴² *Id.* at 600.

⁴³ *Id.*

⁴⁴ *Id.* at 601.

⁴⁵ *Id.*

⁴⁶ *Id.* (The court looked to *Great Basin Mine Watch*, a case handled by the Interior Board of Land Appeals (IBLA), for guidance. *Great Basin Mine Watch* also involved a phased exploration project, however, there, unlike the instant case, the defendants provided the BLM with the locations of drill sites and roads for the first phase of the project. The court did not find that the latter part was necessary in all phased exploration projects. *Great Basin Mine Watch*, 159 IBLA 324, 346 (IBLA 2003)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 602.

environmental impact, after disclosure of and public comment on a proposed action.⁴⁹ An EIS is inadequate if all viable alternatives have not been examined.⁵⁰ However, NEPA does not require separate consideration of alternatives if those alternatives do not differ significantly from the proposed action.⁵¹ The court found that the BLM was not required to address the proposed alternatives in the EA because the mitigation measures and consequences were substantially similar to the courses of action that were actually considered.⁵²

An EA carries less of an obligation than an EIS to consider alternatives, requiring only that an agency briefly discuss alternatives.⁵³ The plaintiffs also argued that the BLM violated NEPA by only considering two actions and by only including a one-paragraph discussion of a “no action alternative” in the amendment’s EA.⁵⁴ The court found the plaintiffs’ arguments to be without merit, because the amendment’s EA was tiered with references to the original EA, analyzing the direct impacts of exploration activities.⁵⁵ Furthermore, a plain reading of the regulations does not require consideration of a specific number of alternatives.⁵⁶

3. Failure to Assess Cumulative Impacts in the Amendment’s EA

BLM did not sufficiently assess the cumulative impacts of the HC/CUEP. A cumulative impact is the environmental impact of an action, along with “past, present and reasonably foreseeable future actions.”⁵⁷ NEPA requires that EAs fully address the cumulative impacts of a project in detail.⁵⁸ General statements and allusions regarding possible effects are inadequate,

⁴⁹ *Id.* at 601 (citing 42 U.S.C. § 4332(E) (2010); *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005)).

⁵⁰ *Id.* at 602; (citing *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (citing *N. Idaho Community Action Network v. U.S. Dept. of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008)).

⁵⁴ *Id.* at n. 11.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 603 (citing 40 C.F.R. § 1508.7 (Westlaw current through Aug. 12, 2010)).

⁵⁸ *Id.*

absent some “quantified or detailed” information.⁵⁹ The BLM identified a cumulative effects area, within which was a proposed mining operation, but did not effectively discuss both the mitigated and unmitigated cumulative impacts on cultural and religious resources within the area.⁶⁰ The court found that the visual and physical restriction of Mount Tenabo, the decrease in the number of pinyon pine and the possible disturbance of burial sites were cumulative impacts from the amendment that were not sufficiently analyzed.⁶¹ The court stated that a plaintiff need not show that cumulative impacts will occur, only that the potential for them to occur exists.⁶² Because the court concluded that the BLM did not sufficiently assess all of the cumulative impacts of the Amended HC/CUEP, it held that the district court erred in granting summary judgment to the defendants on the NEPA claim.⁶³

B. National Historic Preservation Act

The plaintiffs claimed that the BLM violated section 106 of the NHPA, which required the BLM to take into account the effects of the project on any site or structure eligible for inclusion in the National Register of Historic Places.⁶⁴ Federal agencies are required to comply with the rules established by the Advisory Council on Historic Preservation.⁶⁵ Under section 106, an agency must make a good-faith effort to identify historic properties; determine whether those properties are PCRIIs and thus eligible for listing on the National Register of Historic Places; assess the effects of the project on the identified properties; determine whether those effects will be adverse; and avoid or mitigate adverse effects.⁶⁶ At all stages of the process,

⁵⁹ *Id.* (citing *Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998)).

⁶⁰ *Id.* at 604.

⁶¹ *Id.* at 606.

⁶² *Id.* at 605.

⁶³ *Id.* at 606.

⁶⁴ *Id.* 607 (citing 16 U.S.C. § 470(f) (2010)).

⁶⁵ *Id.* (The Advisory Council on Historic Preservation has been delegated the authority to promulgate rules under 16 U.S.C. § 470(s) (2010)).

⁶⁶ *Id.* (referencing *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999)).

NHPA requires an agency to consult with tribes that have cultural or religious attachments to potentially affected sites.⁶⁷

1. Insufficient Consultation with the Tribe

Under the NHPA, an agency is required to consult federally recognized tribes, or their representatives, early in the planning process, giving the tribes a reasonable opportunity to identify concerns about historic sites, provide input on a project's effects on the sites, and participate in resolving any adverse effects.⁶⁸ NHPA also mandates that consultation should “recognize the government-to-government relationship between the Federal Government and Indian Tribes.”⁶⁹

The court did not find merit in the plaintiffs' arguments that the BLM was not responsive to GBMW's and WSDP's requests for further information in 2004 and did not initiate consultation with the Tribe in a timely manner.⁷⁰ Neither GBMW nor WSDP were federally recognized Indian tribes or tribal government representatives.⁷¹ The court noted that the BLM began consulting with the Tribe during the original HC/CUEP and made unsuccessful attempts to contact the Tribe prior to opening the amendment's EA for public comment.⁷² Nonetheless, the amendment only changed the amount of land that could be disturbed within the project area, rather than the size of project area, and the plaintiffs failed to demonstrate how earlier consultation would have affected the BLM's decision.⁷³

2. “No Effect” Determination

⁶⁷ *Id.* (citing 36 C.F.R. § 800.2(c)(2) (Westlaw current through Aug. 12, 2010)).

⁶⁸ *Id.* at 608 (citing 36 C.F.R. § 800.2(c)(2)(ii)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 609 n. 19.

⁷² *Id.*

⁷³ *Id.* at 610.

The BLM did not violate NHPA by approving the entire HC/CUEP, because it first surveyed the entire area for PCRIs and then imposed avoidance measures in the form of exclusion zones.⁷⁴ The court found that under the NHPA, the BLM was only required to protect the discrete features from adverse effects if those features were eligible for inclusion on the National Register of Historic Places, rather than the entire area in which the features were located.⁷⁵ Since the BLM identified and placed exclusion zones around PCRIs, the court found the BLM's "no effect" determination proper.⁷⁶

Because the BLM properly consulted with the Tribe and followed proper procedure in reaching a "no effect" determination, the court found that the BLM did not violate the NHPA when it approved the Amended HC/CUEP.⁷⁷

C. Federal Land Policy and Management Act

Finally, the plaintiffs challenged the BLM's compliance with the FLPMA. The FLPMA required the BLM to regulate and take any required action to prevent unnecessary degradation of the land.⁷⁸ The BLM set forth "surface management" regulations governing proposals and mining activities.⁷⁹

1. Failure to Submit Detailed Plans of Operations

Title 43, section 3809.401(b) of the Code of Federal Regulations (C.F.R.) requires mining operators to describe their proposed operations in enough detail for the BLM to determine whether or not their operations prevent undue degradation of public lands.⁸⁰ The plaintiffs' contentions that Cortez did not submit preliminary or conceptual designs, cross

⁷⁴ *Id.*

⁷⁵ *Id.* at 611.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (see 43 C.F.R. § 3809 (Westlaw current through Aug. 12, 2010)).

⁸⁰ *Id.* at 612.

sections, and operating plans were unfounded, because those requirements were specifically limited to mining operations and did not apply to exploration activities.⁸¹ The court found that the amendment's EA did include the information required by title 43 C.F.R. section 3809.401, and the plaintiffs made no showing that Cortez did not describe their proposed operations in enough detail that the BLM could not determine whether the operations prevented undue degradation of public lands.⁸²

2. Performance Standards

Under the FLPMA, a plan of action must comply with certain performance standards set forth in title 43 C.F.R. section 3809.420 to prevent undue degradation.⁸³ The court found that Cortez had not violated the requirement to supply the BLM with information on their access routes⁸⁴ because the amendment's EA and both the original and modified DR/FONSI required them to submit maps of the routes prior to conducting earth-disturbing activities.⁸⁵ The court also found that the BLM met their requirement to protect cultural resources⁸⁶ because of the avoidance measures imposed by the EA.⁸⁷ Lastly, the court disregarded the plaintiffs' argument that the FLPMA called for broader protections of cultural resources than the NHPA, because the plaintiffs merely asserted and did not argue this position.⁸⁸

Because the BLM determined that Cortez would not cause undue degradation of the land during exploration, the court held that the BLM did not violate the FLPMA when it approved the

⁸¹ *Id.* (see 43 C.F.R. § 3809.401(b)(2)(ii)).

⁸² *Id.*

⁸³ *Id.* at 613.

⁸⁴ *Id.* (see 43 C.F.R. § 3809.420(b)(1)).

⁸⁵ *Id.*

⁸⁶ *Id.* (see 43 C.F.R. § 3809.420(b)(8)).

⁸⁷ *Id.*

⁸⁸ *Id.*

Amended HC/CUEP.⁸⁹ However, the court remanded the case because the BLM violated NEPA by failing to conduct an adequate analysis of the HC/CUEP's cumulative impacts.⁹⁰

IV. CONCLUSION

Public lands in the western United States are rich in both natural and cultural resources. It is imperative that the mining industry, Native American tribes, and the BLM forge working relationships to facilitate a balance of each entity's interests in the region. Cultural resources are of vital cultural and historic importance, while the exploration and production of natural resources is necessary to meet both national and global demands. This case points out that in the heavily regulated mining industry, standards for exploration differ from the actual mining operations. Thorough analyses of impacted lands help minimize the effects of exploration and mining activity while maintaining an agenda of preserving cultural resources. Although many of the plaintiffs' arguments had little chance of succeeding, cases such as this highlight the necessity of complete conformance with regulatory standards as requisite to mining activities.

⁸⁹ *Id.*

⁹⁰ *Id.*